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Pizza Hut, Inc. v. Papa John's International, Inc., Papa John's USA Inc. 2000 U.S. App. LEXIS 23444

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***PIZZA HUT, INC. V. PAPA JOHN'S
INTERNATIONAL, INC., PAPA JOHN'S USA INC.***

2000 U.S. App. LEXIS 23444

INTRODUCTION

Pizza Hut filed a civil action in the United States District Court for the Northern District of Texas charging Papa John's with false advertising in violation of Section 43 (a)(1)(B) of the Lanham Act. Specifically, Pizza Hut alleged that Papa John's slogan: "Better Ingredients. Better Pizza," when viewed in the context of Papa John's overall advertising campaign, bears a false statement of fact actionable under section 43(a) of the Lanham Act. Papa John's responded by denying that its advertising and slogan violated the Lanham Act and moved for a judgment as a matter of law. After evaluating the jury's responses to a series of special interrogatories, the district court denied Papa John's motion for judgment as a matter of law and entered judgment for Pizza Hut. Papa John's appealed this decision, and the United States Court of Appeals for the Fifth Circuit reversed the district court's denial of Papa John's motion.

I. FACTS

Pizza Hut, a wholly owned subsidiary of Tricon Global Restaurants, is the largest pizza chain in the United States. Papa John's, Pizza Hut's competitor, was founded by John Schnatter in the back of his father's tavern. Papa John's has grown to become the third largest pizza chain in the United States.¹ In 1995, Papa John's adopted a new slogan: "Better Ingredients. Better Pizza."

¹ Pizza Hut, Inc. v. Papa John's Int'l, Inc., 2000 U.S. App. LEXIS 23444, 3 (5th Cir. 2000).

A year later Papa John's filed for a federal trademark registration for this slogan with the United States Patent & Trademark office ("PTO"), which was ultimately granted. Papa John's spent over \$300 million building up its trademark by placing the slogan on millions of signs, shirts, menus, pizza boxes, and in its radio and television ads.²

In May 1997, Pizza Hut launched its "Totally New Pizza" campaign, a \$50 million project in which Pizza Hut declared "war" on poor quality pizza and "dared" anyone to find a "better pizza" than Pizza Hut's. That same year Papa John's launched an ad campaign directed towards Pizza Hut's "Totally New Pizza" campaign. The campaign touted the superiority of Papa John's pizza over Pizza Hut's pizza. The ad campaign was extremely successful and Papa John's sales increased 11.7 percent over its 1996 sales, whereas Pizza Hut's sales went down 8 percent.³

In February 1998, Papa John's launched a second series of ads as a response to Pizza Hut's dare to find a better pizza. The ads praised the results of a taste test in which consumers were asked to compare Papa John's and Pizza Hut's pizza. The taste test showed that consumers preferred Papa John's traditional crust pizza to Pizza Hut's comparable pizza by a 16 point margin (58% to 42%); and, preferred Papa John's thin crust pizzas by a 14-point margin (57% to 43%).⁴ Subsequent to the taste test ads, Papa John's ran a series of ads comparing the ingredients, specifically the sauce and dough used in their pizza with those used by competitors. In the sauce ads, Papa John's claimed that "its sauce was made from 'fresh, vine-ripened tomatoes,' which were canned through a process called 'fresh pack,' while its competitors, including Pizza Hut, make their sauce from re-manufactured tomato paste."⁵ During the dough campaign, Papa John's stated that "it used 'clear filtered water' to make its pizza dough, while the 'biggest chain'

2 *Id.* at 3.

3 *Id.* at 4.

4 *Id.* at 5.

5 *Id.*

uses 'whatever comes out of the tap'.⁶ In all these comparison ads Papa John's used the slogan "Better Ingredients. Better Pizza."

On August 12, 1998, Pizza Hut filed a civil action in the United States District Court for the Northern District of Texas charging Papa John's with false advertising alleging that Papa John's slogan: "Better Ingredients. Better Pizza," when viewed in the context of Papa John's overall advertising campaign, bears a false statement of fact actionable under section 43(a) of the Lanham Act.⁷ Papa John's denied that their advertising and slogan violated the Lanham Act and moved for a judgment as a matter of law.⁸

Following an evaluation of the jury's responses to a series of special interrogatories, the district court denied Papa John's motion for judgment and entered judgment for Pizza Hut. The Court concluded that Papa John's slogan from the time of its introduction up until May 1997 was considered non-actionable puffery, but the slogan "became tainted . . . in light of the entirety of Papa John's post-May 1997 advertising."⁹ Based on this conclusion, the judge permanently enjoined Papa John's from using the slogan or any variation of it in the future. Furthermore, the court enjoined Papa John's from claiming that its pizza components are superior to Pizza Hut's pizza components unless the claim is supported by scientifically demonstrated attributes of superiority or taste test surveys.¹⁰ The Court awarded Pizza Hut \$467,619.75 in damages to run corrective ads. Papa John's appealed this decision, and the Court of Appeals for the 5th Circuit reversed the district court's denial of Papa John's motion for judgment as a matter of law.¹¹

6 *Pizza Hut*, 2000 U.S. App. LEXIS 23444 at 5.

7 *Id.* at 7.

8 *Id.*

9 *Id.* at 10.

10 *Id.* at 11.

11 *Pizza Hut*, 2000 U.S. App. LEXIS 23444 at 12.

II. LEGAL ANALYSIS

A. ISSUES

On appeal, the 5th Circuit considered whether the evidence established that Papa John's slogan "Better Ingredients. Better Pizza." is misleading and violates section 43(a) of the Lanham Act. In making its determination, the court considered two issues: (1) whether the slogan "Better Ingredients. Better Pizza." standing alone is a statement of fact capable of deceiving a substantial number of consumers to which it was directed;¹² and (2) whether the evidence supports the district court's conclusion that the slogan was misleading and actionable. The court concluded that after May 1997, the slogan became tainted because it was used in a series of ads that compared specific ingredients used by Papa John's with the ingredients used by competitors.¹³

B. DISCUSSION

The Court of Appeals reviewed de novo the district court's denial of Papa John's motion for judgment as a matter of law applying the same standards as the district court.¹⁴ The granting of a judgment, as a matter of law will be appropriate "if, after a party has been fully heard by the jury on an issue, 'there is no legally sufficient evidentiary basis for a reasonable jury to find for that party with respect to that issue.'"¹⁵ The court reviewed the evidence in the most favorable light to Pizza Hut.

Section 43(a) of the Lanham Act states: "Any person who . . . in commercial advertising or promotion, misrepresents the nature, characteristics, quality, or geographic origin of his or another person's good, services, or commercial activities, shall be liable in

¹² *Id.* at 24.

¹³ *Id.*

¹⁴ *Id.* at 12.

¹⁵ *Id.* citing *Rutherford v. Harris County, Texas*, 197 F.3d 173, 179 (5th Cir. 1999).

a civil action by any person who believes that he or she is likely to be damaged by such act.”¹⁶ In order for Pizza Hut to succeed on its false advertising claim, under section 43(a), they must establish: (1) a false or misleading statement of fact about a product; (2) such statement either deceived, or had the capacity to deceive a substantial segment of potential consumers; (3) the deception is material, in that it is likely to influence the consumer’s purchasing decision; (4) the product is in interstate commerce; and, (5) the plaintiff has been or is likely to be injured as a result of the statement at issue.¹⁷ Pizza Hut could obtain monetary damages or equitable relief if it demonstrated that the “commercial advertisement or promotion is either literally false, or that it is likely to mislead and confuse consumers.”¹⁸ “If the statement is shown to be misleading, the plaintiff must also introduce evidence of the statement’s impact on consumers, referred to as materiality.”¹⁹

1. Statement of Fact Actionable Under the Lanham Act

Papa John’s argued that the slogan is non-actionable puffery and asserts that the statement is not a statement of fact actionable under section 43(a), but rather is a statement of belief or opinion. Current case law has established that “the statement at issue must be a ‘specific and measurable claim, capable of being proved false or of being reasonably interpreted as a statement of objective fact.’”²⁰ Furthermore, it has been held that, “a statement of fact is one that (1) admits of being adjudged true or false in a way that (2) admits of empirical verification.”²¹

16 15 U.S.C. § 1125(a)(1)(B) (West 1999).

17 *Pizza Hut*, 2000 U.S. App. LEXIS 23444 at 14.

18 *Id.* at 15, citing *Seven-Up*, 86 F.3d at 1390.

19 *Id.*, citing *American Council of Certified Podiatric Physicians and Surgeons v. American Bd. Of Podiatric Surgery, Inc.*, 185 F.3d 606, 614 (6th Cir. 1999).

20 *Pizza Hut*, 2000 U.S. App. LEXIS 23444 at 16, citing *Coastal Abstract Serv., Inc., v. First Am. Title Ins. Co.*, 173 F.3d 725, 731 (9th Cir. 1999).

21 *Id.* citing *Presidio Enters., Inc. v. Warner Bros. Distrib. Corp.*, 784 F.2d 674, 685 (5th Cir. 1986).

For the court to determine whether Papa John's slogan standing alone constitutes a statement of fact under the Lanham Act, the court dissected the slogan "Better Ingredients. Better pizza." Looking first at the statement "Better Pizza," the court believed that the simple statement "epitomizes the exaggerated advertising, blustering, and boasting by a manufacturer upon which no consumer would reasonable rely."²² Furthermore, it was noted that other nationwide pizza chains use slogans similar to Papa John's touting their pizza as the best. Examples of such slogans are Pizza Hut's slogan "The Best Pizza Under One Roof", Domino's Pizza's slogan "Nobody Delivers Better.," Danato's "Best Pizza on the Block" slogan, and Pizza Inn's slogans "Best Pizza Ever." and "The Best Tasting Pizza."²³ Accordingly, the court concluded that Papa John's assertion "Better Pizza." is non-actionable puffery.

The court next considered the statement "Better Ingredients." and found that the statement was one of opinion. "What makes one food ingredient 'better' than another comparable ingredient, without further description, is wholly a matter of individual taste or preference not subject to scientific quantification."²⁴ Finally, the court combined the two non- actionable statements as a whole and failed to see how the simple joining of two opinionated statements changes the essential nature of each phrase, making it an actionable statement of fact.²⁵ The court therefore held that there was no legally sufficient basis for finding that the slogan standing alone is a false or misleading statement of fact.

2. Materiality of the Statement

In determining whether Papa John's slogan "Better Ingredients. Better Pizza." is misleading and violative of section 43(a) of the Lanham Act, the court next considered whether the use of the slogan in connection with misleading comparative ads tainted the

²² *Pizza Hut*, 2000 U.S. App. LEXIS 23444, 25.

²³ *Id.* at 26.

²⁴ *Id.* at 27.

²⁵ *Id.* at 28.

statement of opinion, therefore becoming misleading under section 43(a) of the Lanham Act.

The court first evaluated the sufficiency of the evidence that supports the jury's conclusion that the comparison ads - specifically the sauce and dough ads - were misleading.

a. Sauce and dough ads

In first addressing the sauce ads, the evidence showed that although the methods of producing competing sauces differed, both Pizza Hut and Papa John's sauces were made primarily from vine-ripened tomatoes, and that the consistency and water content of the sauces was identical. The court also noted that Papa John's produced no credible evidence to demonstrate the existence of demonstrable differences in the competing sauces.²⁶ The court thus concluded that "without any scientific support or properly conducted taste preference test, by the written and/or oral negative connotations conveyed that pizza made from tomato paste concentrate is inferior to the 'fresh pack' method used by Papa John's, its sauce advertisement conveyed an impression which is misleading."²⁷

Then turning to the dough ads, the evidence again "established that there is no quantifiable difference between pizza dough produced through the 'cold or slow-fermentation method' (used by Papa John's), or the 'frozen dough method' (used by Pizza Hut)."²⁸ Consequently, the court concluded that even though the ads were true about the ingredients used by Papa John's, there was sufficient evidence to support the jury's conclusion that the comparative ads were misleading in their suggestion that the Papa John's ingredients were superior.²⁹

²⁶ *Id* at 31.

²⁷ *Pizza Hut*, 2000 U.S. App. LEXIS 23444 at 32.

²⁸ *Id*.

²⁹ *Id*. at 34.

b. Conjunction of Slogan with Misleading Ads

Pizza Hut alleged and the district court agreed that the use of the slogan “Better Ingredients. Better Pizza.” in conjunction with the misleading comparative ads, gave quantifiable meaning to the slogan making a general statement of opinion misleading within the meaning of the Lanham Act. Pizza Hut argued, “in construing any advertising statement, the statement must be considered in the overall context in which it appears.”³⁰ Pizza Hut also claimed that since Papa John’s gave consumers specific facts that their sauce and dough are ‘better,’ Papa John’s statement of opinion that it made a “Better Pizza” became misleading. Then, by using the slogan in “combination with the ads comparing Papa John’s sauce and dough with the sauce and dough of its competition, Papa John’s gave quantifiable meaning to the word ‘Better’ rendering it actionable under section 43(a) of the Lanham Act.”³¹

The court agreed that the message communicated by the slogan was expanded and given additional meaning when it was used as the tag line in the sauce and dough ads. By using the slogan in the comparison ads, Papa John’s gave a definition to the word “better” because a reasonable consumer would understand the slogan as saying that Papa John’s uses “better ingredients,” which produces a “better pizza” because Papa John’s uses “fresh-pack” tomatoes, fresh dough, and filtered water.³² The court, however, found no evidence showing that the slogan was tainted as a result of its use in the misleading comparison ads. There was no evidence that showed the slogan had “become encoded in the minds of consumers such that the mention of the slogan reflectively brought to mind the misleading statements conveyed by the sauce and dough ads.”³³ Thus, the court found that Pizza Hut failed to show sufficient evidence to support the district court’s conclusion that the slogan became tainted by its use with the misleading ads.

30 *Id.* at 35.

31 *Id.*

32 *Pizza Hut*, 2000 U.S. App. LEXIS 23444 at 36.

33 *Id.* at 36.

c. Consumers Reliance

In order for Pizza Hut to succeed, it was required to show that the misleading statements had a tendency to influence the purchasing decision of consumers to which they were directed. Pizza Hut presented three factors to establish that the misleading statement of fact conveyed by the ads and the slogan were material to consumers in making their purchasing decisions. Pizza Hut first relied on the results of a survey conducted by an independent expert regarding the use of the slogan, however, this evidence was excluded by the district court, and therefore the Court of Appeals did not consider this evidence either.³⁴ Second, Pizza Hut produced two surveys that attempted to measure consumer perception of Papa John's "taste test" ads. The court found, however, that this evidence "fail(ed) to address Pizza Hut's claim of materiality with respect to the slogan."³⁵ Finally, to demonstrate materiality, Pizza Hut attempted to rely on both Papa John's own studies, and on the subjective intent of Papa John's executives to create a perception that Papa John's uses better ingredients. The court rejected this evidence because "the study failed to indicate whether the conclusions resulted from the advertisement at issue, from the personal eating experiences, or from a combination of both."³⁶ The court concluded that Pizza Hut offered no evidence to show that the slogan had the tendency to deceive consumers so as to affect their purchasing decisions.

CONCLUSION

The United States Court of Appeals for the 5th Circuit found that the district court erred in denying Papa John's motion for judgment as a matter of law. The court held that the slogan used by Papa John's, standing alone, is not a statement of fact that consumers would rely upon. Rather, the slogan is a statement of opinion and does not constitute a false or misleading statement of

³⁴ *Id.* at 40.

³⁵ *Id.*

³⁶ *Id.* at 41.

fact actionable under section 43(a) of the Lanham Act.³⁷ Furthermore, although the slogan became misleading and actionable because it was given quantifiable meaning when it was used as a tag line in rather misleading sauce and dough ads, Pizza Hut failed to give sufficient evidence demonstrating that the misleading facts communicated by the slogan were material to the consumers to which it was directed.³⁸ Thus, the court found no evidence of violation of the Lanham Act and held that the district court erred in denying Papa John's motion for judgment as a matter of law.

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³⁷ *Pizza Hut*, 2000 U.S. App. LEXIS 23444 at 43.

³⁸ *Id.*